while reference is made to the earlier cases of *Brisbane* v. *Pratt* (1847) 4 Denio, 63, and *Green* v. *Givan* (1865) 33 N. Y. 343, 369. The first of these is a decision squarely in point, as the admissions of the holder of a note were allowed in evidence against a subsequent indorsee who was not shown to have paid value. *Paige* v. *Cagwin* was quoted and discussed, as it is also in *Schenck* v. *Warner* (1862) 37 Barb. 258, 263. This last case is cited with approval in *Lyon* v. *Ricker* (1894) 141 N. Y. 225. In *Parkhurst* v. *Higgins* (1885) 38 Hun, 113, the statements of a mortgagee were admitted against his residuary legatee. So in *Kennedy* v. *Wood* (1889) 52 Hun, 48, the declarations of an assignor were held admissible against his assignee for the benefit of creditors on the express ground that he was not a purchaser for value, *Passavant* v. *Cantor* (1891) 17 N. Y. Supp. 37, *accord;* while in *Baird* v. *Baird* (1894) 81 Hun, 300, affirmed in 145 N. Y. 659, the admissions of the testator were held to be evidence against his personal representative. See, also, the wretchedly reported case of *Smith* v. *Sergent* (1875) 2 Hun, 107. *Merkle* v. *Beidleman*, already mentioned, is the latest decision in point. The court below (1898) 30 App. Div. 14, admitted the evidence on the ground of lack of good faith in the assignee. On appeal this was held error (1900) 165 N. Y. 21, the purchase having been for value; and in the opinion the language from *Paige* v. *Cagwin* already referred to was quoted.

The foregoing, there is reason to believe, comprise all the New York cases on the subject. It will be noted, however, that the dissension has arisen chiefly over assignees in bankruptcy or insolvency. Apparently the evidence will be admitted in the case of legatees, and indeed it could hardly be otherwise in view of the language of *Paige* v. *Cagwin*, repeatedly affirmed. An analogous position would be that of a mere donee *inter vivos*, and possibly of an administrator or executor. Then comes in question the validity of the distinction taken in *Bullis* v. *Montgomery* (*cf.*, *contra*, the reasoning of *Passavant* v. *Cantor*, *supra*), as to the standing of an assignee in insolvency, analogous to which appears to be that of an assignee in bankruptcy. On these points the Court of Appeals carefully refrained, in *Merkle* v. *Beidleman*, from all expression of opinion.—B. R. R.

REAL PARTY IN INTEREST UNDER THE CODES. One of the most distinctive features of the code system of procedure is the provision that actions must be brought by the real party in interest. Perhaps the chief object of the rule was to allow an assignee of a *chose* in action to sue in his own name. *Schaefer* v. *Henkel* (1878) 75 N. Y. 378. In some States it was expressly provided that legal title to most *choses* in action might be transferred. Alabama Code of 1852, § 1530 (now § 876); Iowa Code of 1851, § 949 (now § 3044). In New York the same result was apparently reached by judicial construction of the real party in interest section, *Petersen* v. *Chemical Bank* (1865) 32 N. Y. 21, although the point was not conclusively settled until the enactment of the Code of Civil Pro-

cedure, § 1910. Accordingly in the majority of the Code States the conclusion has been reached that the person who holds legal title to a *chose* in action is the real party in interest. *Sheridan* v. *The Mayor* (1876) 68 N. Y. 30; Pomeroy, Code Rem. § 132. In Indiana and Nebraska, however, it was decided that legal title without a beneficial interest in the proceeds was not sufficient to entitle a person to sue. *Swift* v. *Ellsworth* (1858) 10 Ind. 205; *Hoagland* v. *Van Etten* (1898) 22 Neb. 681. The prevailing view, after having obtained in Kansas for the last fifteen years, has recently been rejected by the Supreme Court of that State, although not without the strong dissent of three of its judges. *Stewart* v. *Price* (Kas. 1902) 67 Pac. 553.

In that part of their report to the New York legislature which dealt with the section of the code now under discussion the codifiers said: "The true rule undoubtedly is that which prevails in the courts of equity,—that he who has the right is the person to pursue the remedy. We have adopted that rule." First Report of the Commissioners on Practice and Pleading (1848) p. 124. In *Stewart* v. *Price*, *supra*, there was an absolute assignment of the claim in writing. The plaintiff had, it was admitted, legal title to the *chose* in action. The plaintiff and he alone had the right and was the person to pursue the remedy. He was, it is true, under a contract obligation to pay the proceeds, if any, over to his assignor. Admitting the validity of the assignment, however, the result should be the same as if the contract had been to pay the proceeds to an utter stranger. In such a case there is no intention to reassign the claim, no intention to step down and out and allow the other to be substituted as a new creditor. There are two distinct rights in existence, that of the assignee against the debtor, and that of the third person against the assignee. Nor is the position of the parties changed in this respect if the assignee be said to hold the *chose* in action in trust for the third person. As long as the trust is in existence the *cestui's* rights are against the trustee only. If now the proceeds are to go to the assignor instead of to a stranger, there are still two separate rights. The assignor no longer has any claim upon the debtor. He has parted with that by his assignment and it belongs to the assignee. The assignor has a different and distinct right against the assignee. This, moreover, was what the parties intended. In the principal case the assignor testified that the defendant no longer owed her anything and that the money was due from the plaintiff. Of course the collateral agreement to pay the proceeds to the assignor may be some evidence to show that there was no valid assignment, and that the apparent assignee has no title and is merely an agent of the assignor. *Hays* v. *Hathorn* (1878) 74 N. Y. 486. If however, the title to the claim has actually been transferred, even though the motive was one of convenience in collection, *Brown* v. *Powers* (1900) 53 App. Div. 251, the assignee alone has a right against the debtor and is therefore, within the meaning of the code provision as expressed by the codifiers themselves, the person to pursue the remedy. As said by HUNT, C., in *Allen* v. *Brown*

(1870) 4 N. Y. 228, 231, "The whole title passes to the assignee and he is legally the real party in interest. . . . Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his."

There is another reason why the decision in the principal case is to be regretted. The rule that an action must be brought by the real party in interest applies to negotiable instruments as well as to other *choses* in action. Business men every day transfer notes or bills of exchange to others in order that the latter may collect them. To make the collector a mere agent often has disadvantages and the intention of the parties is to transfer title to the specific instrument and to rely on a collateral agreement for a disposition of the proceeds. This was permitted before the codes, Pomeroy, Code Rem. § 128, and is still in most of the States. Where the rule of the principal case obtains, however, an indorsee of negotiable paper, having legal title to the instrument, will be defeated if he has made any arrangement to give the proceeds to other parties. *Bostwick* v. *Bryant* (1887) 113 Ind. 448. Such a result is a hindrance to commercial transactions, disregards the intentions of the parties, and violates the spirit of the code provision which seeks to give the remedy to the person who possesses the right.

LIMITATION OF CARRIER'S LIABILITY AND FAILURE TO STOP IN TRANSITU—SHIPPER'S ASSENT TO TERMS. The New York Court of Appeals has recently held by a majority of five to two, that a clause in a shipper's express receipt, limiting the carrier's liability "in any case whatever" to fifty dollars, does not protect the carrier where the goods have been negligently delivered to the consignee in spite of an order to stop *in transitu*. *Rosenthal* v. *Weir* (1902) 63 N. E. 65, affirming 54 App. Div. 275. Though the point is a new one, neither the prevailing nor the dissenting opinion is very thoroughly reasoned; the decision, however, seems correct. The position of the majority of the court is that the stoppage *in transitu* put an end to the contract of carriage, giving rise to the relation of bailor and bailee, and that to this new relation the bill of lading had no reference. The first of these propositions is supported by authority. *Pontifex* v. *Midland Ry. Co.* (1877) L. R. 3 Q. B. D. 23. The second is a more open question and it is here that CULLEN, J., and PARKER, C. J., dissent. Whether exceptions in a bill of lading apply to the carrier's liability as a warehouseman before or after the journey is a question that has never arisen in New York, and could hardly arise in States where a limitation of liability is void in case of negligence, as the warehouseman is liable only for negligence. The only case found is a Kansas case, not noticed by the court, holding that the exceptions apply only to the contract of carriage and not to the warehouseman's liability. *Union Pac. R. Co.* v. *Moyer* (1888) 40 Kas. 184. In a somewhat similar case the Court of Appeals held that a clause in a bill of lading, exempting the carrier from liability for the negligence of the pilot,